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"Hard Strikes and Foul Blows:" *Berger v. United States* 75 Years After

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Essay

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*Bennett L. Gershman**

I. INTRODUCTION

Seventy-five years ago, Woody Allen was born and Oliver Wendell Holmes, Jr. died. Other notable events also occurred that year.[1] Italy invaded Ethiopia; the anti-Jewish "Nuremberg Laws" went into effect in Nazi Germany; Persia was renamed Iran; and Babe Ruth played his last game and hit his last home run. 1935 also saw the first appearances of Bugs Bunny, parking meters, the board game Monopoly, canned beer, nighttime Major League Baseball, Alcoholics Anonymous, and George Gershwin's "Porgy and Bess." Bruno Richard Hauptmann was convicted and sentenced to death for the kidnapping and murder of Charles Lindbergh, Jr.; the Barker Gang was killed in a shootout with the FBI; Huey Long, U.S. Senator from Louisiana, was shot to death in the Louisiana Capitol in Baton Rouge; T.E. Lawrence was killed in a motorcycle accident in Dorset, England; and Will Rogers died in a plane crash. Also that year, President Franklin Delano Roosevelt's "New Deal" to bring the nation out from the Great Depression was energized by the passage of the Social Security Act and the creation of the Works Progress Administration, but was dealt a stunning setback when the nation's highest court, operating from its newly-opened Supreme Court Building, declared the National Industrial Recovery Act unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*.[2]

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1. *See Today in History for Year 1935*, HISTORY ORB, http://www.historyorb.com/date/1935 (last visited Sept. 10, 2010).

2. 295 U.S. 495, 551 (1935).

Indeed, of all the noteworthy events of 1935, perhaps the most noteworthy of all—certainly for legal academics and historians—was the aggressive interposition of a majority of the U.S. Supreme Court against the New Deal, in the "most ambitious dragon-fight" in the Court's history to save the nation from the dragons of "socialism" and rescue the maidens of "free enterprise."[3] *Schechter* was the most famous of several cases in the 1935 term, in which a consistent five-Justice majority—whom FDR contended were too old to judge effectively—tore huge holes in the New Deal.[4]

Interestingly, however, the Court that is remembered for championing economic conservatism is also remembered for remarkably progressive rulings that dramatically expanded civil rights and personal freedoms.[5] The "Hughes Court," named for Chief Justice Charles Evans Hughes, incorporated through the Fourteenth Amendment's Due Process Clause the freedoms of speech, press, assembly, and religion contained in the First Amendment. The Hughes Court also handed down sweeping equal protection rulings that would lay the groundwork for the landmark desegregation cases a few decades later. In addition, the Hughes Court expanded the Bill of Rights protections of criminal defendants to have the assistance of counsel, to be protected against coercive methods of police interrogation to obtain confessions, from unreasonable searches and seizures, and a prosecutor's knowing use of perjured testimony at trial to obtain a criminal conviction.[6]

But of all the criminal procedure decisions from the Hughes Court, and particularly cases dealing with a defendant's right to a fair trial, one decision stands out. Indeed, courts have cited this decision so often that it has attained a near-iconic status for its description of the prosecutor's

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3. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 91, 110 (Sanford Levinson ed., 3d ed. 2000) (discussing the Supreme Court's opposition to President Roosevelt's New Deal legislation).

4. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 631 (1935) (limiting the President's power to dismiss members of federal regulatory agencies); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 374 (1935) (striking down a statute requiring railroads and their employees to contribute to a federally-administered pension fund); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 394 (1935) (striking down provisions of the National Industrial Recovery Act permitting the President to bar interstate shipments of oil produced in excess of limits established by oil-producing states).

5. *See* WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930–1941, at 172 (2007) ("[The] Hughes Court decided so many landmark civil liberties cases that scholars have begun to believe that its record on personal liberties transformed the law as profoundly as its 'revolution' in economic cases.").

6. *See infra* notes 77–89 and accompanying text (identifying applicable Hughes Court decisions).

duty to serve justice, play by the rules, and not hit below the belt. In *Berger v. United States*, Justice George Sutherland, who was part of the *Schechter* majority, said the following about the role of the prosecutor:

> [He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[7]

Seventy-five years later, *Berger*'s powerful rhetoric continues to resonate. *Berger*'s exhortation is routinely cited by courts when they reverse a conviction resulting from a prosecutor's misconduct; by lawyers in appellate briefs as a ritualistic incantation of the law's commitment to fair criminal process and the prevention of wrongful convictions; and by academics as a reminder of the appropriate ethical standard for a prosecutor.[8] Indeed, *Berger*'s rhetoric of sportsmanship and fair play is especially attractive in the U.S. legal and social culture that revels in adversarial combat and glorifies feats of athletic prowess. This is particularly apt as it applies to the image of a District Attorney—a "Champion of the People"—vindicating the rule of law in a contest against law-breakers.[9] In fact, the prosecutor described by *Berger* embodies an even more heroic persona—a gladiator who is required to play by special rules that may require him to eschew winning for the nobler goal of serving the cause of justice. What is more heroic than sacrificing self-interest for some higher principle?

But there is another side to this romanticized depiction of the prosecutor's role that *Berger* also recognized, a darker side. Even

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7. 295 U.S. 78, 88 (1935).

8. *See infra* notes 128–36 and accompanying text (illustrating the continuing impact of *Berger*).

9. Metaphors of sports and games are often used when describing U.S. litigation. *See, e.g.*, United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958) (stating that one of the objectives of rules of discovery is to make a trial "less a game of blind man's bluff and more a fair contest"); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279 (1963) (discussing the possibility that the system has become too much like a sporting contest); Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1941) (describing qualities of a "good prosecutor" as including "sensitiveness to fair play and sportsmanship").

though *Berger* exhorted prosecutors to embrace good sportsmanship and play by the rules, the prosecutor, as the *Berger* Court well knew, wants very badly to win. They are armed with more and better weaponry than the adversary; they exercise an inordinate influence over the referee and score-keeper; and they can cheat without getting caught or suffering any penalty.[10] And the prosecutor's cheating costs more than losing a game or a title; it may cost a person his liberty or his life.

Why did the Supreme Court decide to review this particular case at this particular time? It was a tumultuous term for the Court, as well as the country, and *Berger* was a run-of-the-mill federal conspiracy case that raised no constitutional or significant federal question.[11] Nor was this the first case in which the Supreme Court reviewed a claim that a prosecutor had overstepped the bounds of proper courtroom behavior.[12] Although the prosecutor did overreach, his conduct, as we shall see, was not that different from the conduct of prosecutors generally. And even if the Court chose to review the propriety of the prosecutor's conduct, there were factual variables of a criminal trial to consider: the type and extent of the prosecutor's misconduct; whether that misconduct was invited by defense counsel; the strength of the evidence of guilt; and the issuance of curative instructions by the trial court. As a result of such variables, it was unlikely that the Court could fashion any clear standards to guide appellate courts in reviewing misconduct by prosecutors, relying instead on harmless error.

Changes in the law and the culture may have persuaded the Court to take up the case. First, the prosecutor's unfair conduct was pervasive and attracted the attention of courts, academics, and the media. The Court may have seen the need to clarify the prosecutor's legal and ethical responsibilities. Second, because the Court was aggressively seeking to protect an individual's liberty in the marketplace from

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10. *See infra* notes 112–15 (underscoring recent abuses and misconduct by prosecutors).

11. The case did involve a difference between the charge and the proof, but the variance did not seem sufficiently extreme as to call for the Court's intervention. *See infra* note 30 and accompanying text (stating that the Court acknowledged a variance between the indictment and proof at trial but did not think the variance fatal).

12. The Court several years earlier had vacated convictions in several cases involving isolated acts of misconduct by federal prosecutors. *See* Graves v. United States, 150 U.S. 118, 121 (1893) (involving an improper comment in summation on defendant's failure to call a potentially exculpatory witness); Hall v. United States, 150 U.S. 76, 82 (1893) (finding a breach of professional and official duty to offer proof that defendant had committed another unrelated crime); Wilson v. United States, 149 U.S. 60, 70 (1893) (involving an improper comment in summation on defendant's failure to testify). The Court also upheld a conviction notwithstanding improper remarks by the prosecutor. *See* Dunlop v. United States, 165 U.S. 486, 498 (1897) ("If every remark made by counsel outside of the testimony were grounds for a reversal, comparatively few verdicts would stand.").

oppressive government regulations, it might have also seen a similar interest in protecting an individual's liberty in the courtroom from abusive conduct by prosecutors. Third, the wrongful conviction of innocent persons was beginning to attract public attention, and the Court may have recognized that a prosecutor's misuse of power could result not only in an unfair trial but also an erroneous conviction—an intolerable and unacceptable consequence. Fourth, uncertainty in the lower courts over the proper standards and methodology for appellate review of trial errors may have encouraged the Court to clarify the so-called harmless error rule, particularly as it applied to a prosecutor's misconduct. In sum, the *Berger* Court may have believed that exposing and remedying flagrant misconduct by one federal prosecutor might discourage other prosecutors from violating the rules and encourage courts to impose penalties for infractions.

II. *BERGER* THEN

The prosecutor's public image in 1935 was high. For example, William Travers Jerome, New York District Attorney, was dubbed the "Courtroom Warrior" for several popular criminal prosecutions, including the Stanford White and William Rice murder cases.[13] Thomas E. Dewey, New York's famous "rackets-busting" Special Prosecutor, burst onto the national scene in 1935 with his aggressive investigations, prosecutions, and near-perfect conviction record of notorious mobsters and other malefactors. His list of prosecutions included gangsters Dutch Schultz and Lucky Luciano, Tammany Hall politician James J. Hines, and New York Stock Exchange President Richard Whitney.[14] Dewey was the inspiration for the character in the popular radio show "Mr. District Attorney," with its memorable opening: "Mr. District Attorney! Champion of the People! Guardian of Our Fundamental Rights to Life, Liberty, and the Pursuit of Happiness!"[15] As we shall see, however, the prosecutor's public image as a fearless champion of justice coexisted with a strikingly different image—a dirty fighter who wins by cheating.

To be sure, the prosecutor of Harry Berger—Henry Singer, then-Chief Assistant United States Attorney in Brooklyn—did not enjoy the

13. *See generally* RICHARD O'CONNOR, COURTROOM WARRIOR: THE COMBATIVE CAREER OF WILLIAM TRAVERS JEROME (1963) (reviewing several of the high-profile prosecutions led by Jerome).

14. *See* RICHARD NORTON SMITH, THOMAS E. DEWEY AND HIS TIMES 133, 194, 249, 251 (1982) (detailing Dewey's prosecutions of the accused parties).

15. *See Mr. District Attorney on the Job*, BIG LITTLE BOOKS, http://www.biglittlebooks.com/dist_attorney.html (last visited Sept. 10, 2010) (describing the former radio show).

reputation of Dewey or Jerome. He was well known to court observers as an aggressive trial lawyer.[16] Singer fought in France in World War I, studied law, and entered private practice in Brooklyn in the 1920s before joining the U.S. Attorney's Office. While there, the Second Circuit Court of Appeals once rebuked him for improper courtroom conduct.[17] Singer left the U.S. Attorney's Office shortly after the *Berger* trial and re-entered private practice. Shortly thereafter, the state court of New York indicted and convicted him for plotting to bribe a juror in a high-profile murder case.[18] The key testimony against Singer was from an accomplice, whose friends Singer had sent to jail while a federal prosecutor, which was ironic because Singer convicted Berger through an accomplice's testimony. Also ironically, Singer's conviction was reversed by the appellate division, which found that the accomplice's testimony was unbelievable and that Singer's right to a fair trial was prejudiced by inflammatory and incompetent evidence.[19] Singer resumed his law practice and defended several prominent clients, including Jimmy Hoffa and State Supreme Court Justice J. Vincent Keogh. Singer is quoted as having said that the most dangerous quality in a prosecutor is zeal: "Anyone who seeks to become a prosecutor should be disqualified on that ground alone."[20]

Singer prosecuted Berger, along with several other co-defendants, in the federal district court in Brooklyn, New York, for conspiracy to deal in counterfeit bank notes and possession of counterfeit notes. The charges were based on the testimony of Jack Katz, the accomplice described by the Second Circuit as a "thoroughly unreliable person" with a lengthy criminal record of convictions for larceny and forgery.[21] Singer procured Katz's testimony in return for his promise to reduce Katz's punishment from 122 years in prison and a $50,000 fine to two

16. *See* Edward Ranzal, *Court Fix Trial Will Start Today: Justice Keogh and 2 Others Face Charge of Bribery*, N.Y. TIMES, May 14, 1962, at 23 (describing Singer as "a relentless cross-examiner").

17. *See* People v. Silverman, 297 N.Y.S. 449, 457–58 (App. Div. 1937) (noting Singer was rebuked on two separate occasions for improper conduct by two courts).

18. *See* People v. Singer, 295 N.Y.S. 874, 882 (Sup. Ct. 1937) (supplemental opinion) (ruling that Singer was not entitled to a new trial, as additional proof of variance in the witnesses' testimony would not have impacted the verdict).

19. *See Silverman*, 297 N.Y.S. at 463, 472 (describing the difficulty for the jury to weigh testimony and statements made by the prosecution).

20. JAMES B. STEWART, THE PROSECUTORS: INSIDE THE OFFICES OF THE GOVERNMENT'S MOST POWERFUL LAWYERS 287 (1987) (quoting Singer in a discussion of the characteristics of prosecutors).

21. United States v. Berger, 73 F.2d 278, 279 (2d Cir. 1934), *rev'd*, 295 U.S. 78 (1935).

years in prison and a $10,000 fine.[22] Katz testified that he passed counterfeit notes to two persons, Rice and Jones, with whom Berger was not involved.[23] Katz also testified that Berger was involved in one transaction in which Katz gave Berger a few forged bank notes that Berger immediately gave to Jones.[24] Katz's testimony against Berger was suspicious—he was the only witness who stated that Berger handled counterfeit notes, and there was no corroboration of this testimony.[25] Katz had previously expressed hostility towards Berger, whom he suspected of romancing his wife, and he told others that Berger had nothing to do with the forged bills.[26] Seven respected witnesses testified to Berger's good reputation for honesty.[27] The jury acquitted Berger of possessing forged bank notes but convicted him of conspiracy. He was sentenced to a year and a day in the penitentiary.

Berger appealed to the Second Circuit and then to the U.S. Supreme Court. He claimed innocence, and specifically, that Katz framed him. He also argued that he was prejudiced by a variance between the indictment (which charged only one conspiracy involving Katz, Rice, Jones, and Berger) and the proof at trial (which, as noted above, established two separate conspiracies, one of which did not involve Berger). The Second Circuit and the U.S. Supreme Court agreed that there was a variance between the allegations in the indictment and the proof at trial, but both held that the variance was not "fatal."[28] Both courts also agreed that the evidence of Berger's involvement in the conspiracy was weak.[29] Thus, given the weakness of the case against Berger, his second contention became pivotal—that Singer's misconduct was so pronounced and persistent that it destroyed Berger's ability to prove his innocence before a fair and impartial tribunal.

The Second Circuit rejected Berger's misconduct claim in a single paragraph. The court concluded that Singer's misconduct did not impair the trial's fairness. In his opinion for the unanimous panel of four judges, Judge Learned Hand conceded that Singer "failed in

22. *See* Transcript of Record at 93, Berger v. United States, 295 U.S. 78 (1935) (No. 544) [hereinafter Trial Transcript] (recording that Singer states that he would allow Katz's plea deal and reduced punishment "[i]f [he] believed [Katz's] testimony was truthful" and that "[he] would gauge that truthfulness").

23. *Id.*

24. *Id.* at 149.

25. *Id.* at 150, 193.

26. *Id.* at 158–60, 193–94, 261.

27. *Id.* at 205–32.

28. Berger v. United States, 295 U.S. 78, 81 (1935); United States v. Berger, 73 F.2d 278, 280 (2d Cir. 1934), *rev'd*, 295 U.S. 78 (1935).

29. *Berger*, 295 U.S. at 88–89; *Berger*, 73 F.2d at 279.

moderation and good taste" and "abuse[d] his position."[30] However, Hand said, it would be "fantastic" to conclude that the misconduct substantially influenced the outcome.[31] Observing that Singer's misconduct may have "colored the whole, as perhaps it did, and as it was certainly intended to do," and suggesting that the trial judge was derelict in not "keep[ing] him more closely in hand than he did," the panel determined that any harm from Singer's misconduct was "scarcely detect[able]."[32] Thus, "[i]n the case at bar," Hand concluded, "we can find nothing grave enough to compromise its essential fairness."[33]

The Supreme Court unanimously rejected Hand's conclusion and reversed Berger's conviction.[34] Singer's breach of official and professional rules, which the court below dismissed as having a negligible impact on the verdict, was just as confidently condemned by the Supreme Court for its "evil influence upon the jury."[35] Observing that it would be "impossible without reading the testimony at some length . . . to appreciate fully the extent of the misconduct," the Court, quoting extensively from the transcript, was plainly struck by Singer's vicious and unrelenting attack on Berger's character, particularly his savage cross-examination. Singer's assault included insinuations that Berger was a liar and had made statements to Singer that Berger claimed he had not said;[36] made gratuitous insinuations that Berger had

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30. *Berger*, 73 F.2d at 280–81.

31. *Id.* at 281.

32. *Id.*

33. *Id.*

34. *Berger*, 295 U.S. at 89.

35. *Id.* at 85.

36. The following excerpt, quoted by the Court, illustrates Singer's cross-examination of Berger:

> Q. Now Mr. Berger, do you remember yesterday when the court recessed for a few minutes and you saw me out in the hall; do you remember that? A. I do, Mr. Singer.
>
> Q. You talked to me out in the hall? A. I talked to you?
>
> Q. Yes. A. No.
>
> Q. You say you didn't say to me out in the hall yesterday, "You wait until I take the stand and I will take care of you"? You didn't say that yesterday? A. No; I didn't, Mr. Singer; you are lying.
>
> Q. I am lying, you are right. You didn't say that at all? A. No.
>
> Q. You didn't speak to me out in the hall? A. I never did speak to you outside since this case started, except the day I was in your office, when you questioned me.
>
> Q. I said yesterday. A. No, Mr. Singer.
>
> Q. Do you mean that seriously? A. I said no.
>
> Q. That never happened? A. No, Mr. Singer, it did not.
>
> Q. You did not say that to me? A. I did not.

engaged in immoral and wrongful behavior;[37] and made deliberately false and inflammatory insinuations about Berger's character that were obviously intended to mislead the jury.[38] Singer's summation included improper insinuations calculated to mislead the jury[39] and inflammatory attacks on Berger's lawyer.[40] Singer's conduct included snide, sarcastic, and damning comments about Berger and his lawyer that likely produced considerable laughter from spectators in the courtroom at Berger's expense.[41] After describing Singer's misconduct, the Court

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Q. Of course, I have just made that up? A. What do you want me to answer you?

Q. I want you to tell me I am lying, is that so?

Id. No effort was later made to prove that Berger made any such statement. *Id.*

37. *See* Trial Transcript, *supra* note 22, at 259–60 (recording that Singer accused Berger of "running around his apartment with his shirt off," having several women "stay overnight," and "indulging in whatever [he] say[s] was [his] privilege with this lady").

38. The following excerpt, quoted by the Court, illustrates Singer's effort to ridicule Berger's character:

> Q. The man who didn't have his pants on and was running around the apartment, he wasn't there? A. No, Mr. Singer. Mr. Godby told me about this, he told me, as long as you ask me about it, if you want it, I will tell you, he told me "If you give this man's name out, I will give you the works."
>
> Q. Give me the works? A. No, Mr. Godby told me that.
>
> Q. You are going to give me the works? A. Mr. Singer, you are a gentleman, I have got nothing against you. You are doing your duty.
>
> [After defense counsel intervened to suggest that Singer may have misunderstood Berger's answer, Singer continued.]
>
> Q. Wait a minute. Are you going to give me the works? A. Mr. Singer, you are absolutely a gentleman, in my opinion, you are doing your duty here.
>
> Q. Thank you very much. But I am only asking you are you going to give me the works? A. I do not give anybody such things, I never said it.
>
> Q. All right. Then do not make the statement.

Berger, 295 U.S. at 84–85.

39. Singer at one point in his summation invited the jury to conclude that a defense witness named Goldie Goldstein knew Berger but pretended otherwise, and this was within Singer's personal knowledge:

> Mrs. Goldie Goldstein takes the stand. She says she knows Jones, and you can bet your bottom dollar she knew Berger. She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm, everybody started to holler, 'Don't point at him.' You know the rules of law. Well, it is the most complicated game in the world. I was examining a woman that I knew knew Berger and could identify him, she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now, imagine that! But that is the rules of the game, and I have to play within those rules.

Id. at 86–87 (italics omitted).

40. After insinuating that defense counsel was unfairly "trying to twist a witness," Singer stated: "But, oh, they can twist questions . . . they can sit up in their offices and devise ways to pass counterfeit money; 'but don't let the Government touch me, that is unfair; please leave my client alone.'" *Id.* at 88 (italics omitted).

41. Trial Transcript, *supra* note 22, at 260, 446 (recording one of Singer's sarcastic questions to Berger relating to his immoral conduct with women which provoked laughter and caused the

wrote the famous passage quoted above and added that given a jury's trust in the prosecutor, "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."[42]

Given the weakness of the proof of Berger's guilt, the Court had no difficulty concluding that Singer's misconduct altered the playing field and gave him an unfair and undeserved victory. The Court rejected the Second Circuit's conclusory assertions that it would be "fantastic" to find that Singer's misconduct prejudiced the verdict, and that the harm from his misconduct was "scarcely detect[able]." The Court reviewed Singer's misconduct by evaluating the seriousness of his misconduct, the evidence of guilt's strength, and the trial judge's actions minimizing the prejudice. This methodology, according to the Court, must assess the "probability" of harm, rather than the "possibility" of harm; whether the "cumulative effect [of the prosecutor's misconduct] upon the jury" was "consequential," or whether an appellate court would be "justified in assuming its nonexistence"; and whether the trial judge took "stern" and "repressive" measures to blunt the impact of the prosecutor's misconduct.[43] The Court found that Singer's misconduct was "pronounced and persistent," rather than "slight or confined to a single instance";[44] the case against Berger was "not strong" and in fact was "weak";[45] and the trial judge took only "mild judicial action"[46] against Singer, rather than a forceful rebuke and the issuance of a strong curative instruction.[47] Therefore, it was "highly probable" that the misconduct prejudiced the jury.[48]

The Supreme Court unanimously concluded that Singer's misconduct was extreme. He clearly overstepped the bounds of propriety and fairness by misstating facts, assuming prejudicial facts not in evidence, insinuating that witnesses said things they had not said, representing that statements had been made to him personally without proof, and making inflammatory remarks to the jury.

Singer's misconduct was indeed serious, but was it that different from the conduct of prosecutors generally? A survey of the legal

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judge's admonition, "[t]he people that laugh will go out," and Singer's reminder to the jurors of that courtroom laughter in attempting to prod a reluctant defense witness to identify Berger).

42. *Berger*, 295 U.S. at 88.

43. *Id.* at 85, 89.

44. *Id.* at 89.

45. *Id.*

46. *Id.* at 85.

47. *Id.* at 89.

48. *Id.*

landscape at the time suggests that Singer's misconduct was not unusual.[49] Prosecutors were notorious for engaging in forensic lawlessness, and commentators bemoaned its frequency and flagrancy. Dean Roscoe Pound, for example, decried the "number of new trials for grave misconduct of the public prosecutor" and the "abuse and disregard of forensic propriety which threatens to become the staple in American prosecutions."[50] Contemporary legal literature reflected Pound's concern, with articles appearing in law journals and mainstream periodicals containing titles such as *Lawless Enforcement of Law*,[51] *Improper Conduct of Prosecuting Attorneys*,[52] *Remarks of Prosecuting Attorney as Reversible Error*,[53] *Improper Comment Before Jury*,[54] *Prejudicial Error in Trials for Homicide*,[55] *Expression of Opinion by Prosecuting Attorney to Jury*,[56] *Appeals to Race Prejudice by Counsel in Criminal Cases*,[57] *Deception According to Law*,[58] and *Shall Prosecutors Conceal Facts?*[59]

The most famous documentation of misconduct by prosecutors at the time of *Berger* was contained in the 1931 Report by the National Commission on Law Observance and Enforcement, popularly known as the Wickersham Commission.[60] The fourteen-volume Report was the first comprehensive study in U.S. history of virtually every part of the criminal justice system. Although Prohibition appears to have been the

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49. Although *Berger* was a criminal case, one of the Supreme Court's citations in *Berger* indicates the Court's awareness that egregious courtroom misconduct was also committed by lawyers in civil trials. *See* N.Y. Cent. R.R. Co. v. Johnson, 279 U.S. 310, 313–15 (1929) (describing the repeated mischaracterizations by respondents that the petitioner had claimed the respondent had syphilis).

50. ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 187 (Transaction Publishers 1998) (1930).

51. Editorial, *Lawless Enforcement of Law*, 33 HARV. L. REV. 956 (1920).

52. R.F.H., *Improper Conduct of Prosecuting Attorneys*, 24 MICH. L. REV. 834 (1926).

53. J.W.K., *Remarks of Prosecuting Attorney as Reversible Error*, 21 ILL. L. REV. 403 (1926).

54. S.E.V., *Improper Comment Before Jury*, 4 N.C. L. REV. 132 (1926).

55. M.L., *Prejudicial Error in Trials for Homicide*, 2 TEMP. L.Q. 283 (1928).

56. Recent Important Decisions, *Procedure—Expression of Opinion by Prosecuting Attorney to Jury*, 25 MICH. L. REV. 203 (1926).

57. Beirne Stedman, *Appeals to Race Prejudice by Counsel in Criminal Cases*, 4 VA. L. REG. 241 (1918).

58. Morris L. Ernst, *Deception According to Law*, THE NATION, June 1, 1927, at 602.

59. Emory R. Buckner et al., *Shall Prosecutors Conceal Facts?*, THE NATION, June 8, 1927, at 628.

60. The Commission was established in May 1929 when President Herbert Hoover appointed George W. Wickersham to head the National Committee on Law Observance and Enforcement. The eleven-member group was charged with identifying the causes of crime and making recommendations for appropriate public policy. *See* WICKERSHAM COMM'N, http://law.jrank.org/pages/11309/Wickersham-Commission.html (last visited Oct. 24, 2010).

major catalyst for the Commission's study, the Report broadened into a massive critique of U.S. criminal justice, including chapters on the causes and costs of crime, practices by law enforcement agencies, the operation of the judicial system, the work of grand juries and trial juries, sentencing practices, and issues involving immigration and deportation. The Report's documentation of the police use of the "Third Degree"—the infliction of pain, physical brutality, and torture on suspects in order to extort confessions—was prominently featured in the landmark decision in *Miranda v. Arizona*.[61] The Supreme Court placed limits on coercive police interrogation practices in the historic case.

Most relevant to *Berger* is the chapter in the Wickersham Report on prosecutorial misconduct. Titled "Unfairness in Prosecutions," the Report systematically documented widespread abuses by U.S. prosecutors and the adverse impact of the misconduct on the administration of criminal justice.[62] These unfair practices, according to the Report, "create resentment against law and government" because they are committed by the public prosecutor who is so centrally "responsible for law observance."[63] Unlike the "Third Degree," such abuses are not hidden but "occur in the publicity of the court room."[64] According to the Report, the adverse impact of a prosecutor's unfairness is felt most acutely by the accused. The prosecutor's wrongful conduct "easily engenders the dangerous feeling that a fair trial has been denied because the defendant belongs to an unpopular group and that for members of such a group justice through the courts is not to be expected."[65] The accused also believes, justly, that the prosecutor has behaved so "tyrannically and brutally" that it further alienates the defendant from the community and causes him to leave prison a "bitter enemy of society, more willing than before to continue a criminal career."[66] A prosecutor's unfairness, according to the Report, may compel an appellate court to reverse a defendant's conviction and require a second trial in which a guilty man might be totally discharged and escape just punishment had proper methods been used.[67] Finally,

61. 384 U.S. 436, 445–48 (1966).

62. *See* ZECHARIAH CHAFEE, JR. ET AL., UNFAIRNESS IN PROSECUTIONS: REPORT TO THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT 263, 267–347 (1931) (describing instances of prosecutorial misconduct, and making recommendations to address the issue).

63. *Id.* at 268.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

perhaps the most serious consequence of a prosecutor's unfairness may be "the conviction of the innocent."[68]

The Report studied 600 cases from 1926–1930 in which a prosecutor's misconduct had been brought to the attention of an appellate court.[69] In two-thirds of these cases, the courts reversed the conviction. In the remaining one-third, they affirmed the conviction because the defendant's guilt was clear, the trial judge's instruction to the jury cured the misconduct, or defense counsel failed to preserve the issue by an appropriate objection. The Report also examined appellate briefs in the U.S. Supreme Court and courts of last resort in eight states for the same period, and found that unfairness by prosecutors was the most frequent legal claim appearing in the briefs. The Report found that the instances of unfairness that were identified in the appellate decisions "form only a fraction of the total number occurring in the trial courts," and that "[t]here are no available statistics showing the number of innocent persons who have been convicted because of unfair practices but took no appeal."[70]

The Report identified various types of misconduct by prosecutors. The Report described some of the misconduct as attributable to a prosecutor's carelessness, inadvertence, inadequate training, or the "excitement" of a criminal trial, rather than to any deliberate attempt to deprive a defendant of his legal rights. Employing the rhetoric of sports, the Report described such instances of misconduct as being "in the nature of offside plays."[71] A considerable proportion of the decisions, however, depict prosecutorial misconduct that involved a deliberate disregard of the defendant's rights, or inexcusable ignorance of elementary principles of criminal justice, such as the use of inadmissible evidence, attacks on the defendant's character, and inflammatory argument about the defendant, his lawyer, and his witnesses. Such misconduct, according to the Report, "resembles slugging in the line."[72] One can safely assume the Supreme Court in *Berger* shared this sentiment.

This legal environment of prosecutorial abuse occurred simultaneously with the Hughes Court's expansion of the protections of the Bill of Rights. This expansion included the Hughes Court's revolutionizing the First Amendment by applying its protections to the

68. *Id.*
69. *Id.* at 269–320.
70. *Id.* at 270.
71. *Id.* at 271.
72. *Id.*

states. Thus, in *Stromberg v. California*,[73] the Court held that a state's unlawful restriction of speech violated the Fourteenth Amendment. In *Near v. Minnesota*, the Court held that a state's unlawful restriction of the press violated the Fourteenth Amendment.[74] In *DeJonge v. Oregon*, the Court held that a state's unlawful restriction of peaceful assembly violated the Fourteenth Amendment,[75] and in *Cantwell v. Connecticut*, the Court held that a state's unlawful restriction of the free exercise of religion violated the Fourteenth Amendment.[76] The Court also observed in the famous "Footnote Four" in *United States v. Carolene Products Co.* that judicial deference to economic legislation would not necessarily apply to legislation that violated individual liberties or burdened racial minorities.[77] It should not be surprising, therefore, that a Court that was expanding the constitutional rights and liberties of individuals and restraining the power of the legislative and executive branches would review a case involving a prosecutor's flagrant abuse of power.

The Hughes Court also invoked the Due Process Clause to enhance protections for criminal defendants, especially for black defendants tried in Southern courtrooms. Thus, in *Powell v. Alabama*,[78] the infamous "Scottsboro" case, the Court reversed the capital murder convictions of seven indigent and uneducated youths for raping two young white women on a freight train near Scottsboro, Alabama. The Court, in an opinion by Justice Sutherland, the author of *Berger*, found that the defendants were denied meaningful legal representation and held that due process required states to provide free legal counsel to poor persons charged with capital crimes.[79] The Court said that an indigent defendant facing a capital charge "requires the guiding hand of counsel at every step in the proceedings against him," and that to deny him the right "would be little short of judicial murder."[80] Also, during the same term as *Berger*, the Court in *Norris v. Alabama*,[81] and *Patterson v. Alabama*,[82] reversed the murder convictions of two Scottsboro defendants after they had been re-indicted and re-tried, on the ground

73. 283 U.S. 359, 369 (1931).
74. 283 U.S. 697, 707 (1931).
75. 299 U.S. 353, 365 (1937).
76. 310 U.S. 296, 305 (1940).
77. 304 U.S. 144, 152–53 (1938).
78. 287 U.S. 45, 73 (1932).
79. *Id.* at 49, 71.
80. *Id.* at 69, 72.
81. 294 U.S. 587, 596 (1935).
82. 294 U.S. 600, 607 (1935).

that Alabama had systematically excluded African-Americans from the grand jury and trial jury.

The Hughes Court also focused on the fairness and accuracy of the adjudicatory process of criminal trials. In *Mooney v. Holohan*,[83] decided the same term as *Berger*, the Court observed that a prosecutor's "deliberate deception of court and jury by the presentation of testimony known to be perjured" to obtain a conviction was "inconsistent with the rudimentary demands of justice."[84] *Mooney* would become one of the foundational cases for the Court's subsequent false testimony and suppression of evidence jurisprudence under *Brady v. Maryland*.[85] In *Brown v. Mississippi*, the Court vacated murder convictions against three African-American men whose confessions were obtained by the police through torture, including whippings and hanging from a tree, and the prosecutor used these confessions at trial to obtain their convictions.[86] "It would be difficult to conceive of methods more revolting to the sense of justice," the Court wrote, than the methods used by the police to extract the confessions.[87]

Mooney and *Brown* plainly reflected the Hughes Court's concern that a prosecutor's overzealous conduct, including his use of tainted evidence, might result in convicting an innocent person. *Berger* makes this concern explicit, describing the prosecutor as a quasi-judicial official whose obligation is to see "that justice shall be done" and whose professional duty is to prevent "innocence [from] suffer[ing]" and "to refrain from improper methods calculated to produce a wrongful conviction."[88] *Berger* interpreted the prosecutor's public functions to include a negative and an affirmative duty. The negative duty enjoined prosecutors to refrain from striking foul blows and using improper methods to bring about a wrongful conviction. The affirmative duty enjoined prosecutors to promote factually accurate verdicts so that innocent persons do not suffer. Both of these duties arose when a prosecutor used false evidence to produce a false conviction.[89]

To be sure, *Berger*'s announcement that a prosecutor's interest is not to win a case but to ensure that "justice shall be done" was not the first

83. 294 U.S. 103 (1935).

84. *Id.* at 112.

85. *See* Brady v. Maryland, 373 U.S. 83, 86 (1963) (holding that suppression of a confession violated the Due Process clause of the Fourteenth Amendment).

86. 297 U.S. 278, 286 (1936).

87. *Id.*

88. Berger v. United States, 295 U.S. 78, 88 (1935).

89. *See id.* (stating that a U.S. Attorney has the obligation to see that the guilty not escape nor the innocent suffer).

time this conception of the prosecutor's role was expressed, but it was the most authoritative and eloquent pronouncement of this ideal. Courts and commentators for many years had described the prosecutor as a quasi-judicial official whose vast powers could be used both beneficently and wickedly.[90] In describing a prosecutor's dual obligations, the *Berger* Court recognized the relationship between a prosecutor abdicating his role as a minister of justice and engaging in wrongful conduct that could produce an erroneous conviction. The Wickersham Report, as noted above, made the same connection in recognizing that the most serious consequence of a prosecutor's misconduct may be convicting an innocent person.[91]

Although there were prominent dissenters, the question in 1935 of whether innocent persons were convicted of crimes was neither abstract nor hypothetical.[92] For example, the well-known study by Professor Edwin M. Borchard, *Convicting the Innocent*, published in 1932, documented sixty-five cases of convictions of innocent defendants drawn from a much larger number of erroneous criminal convictions of innocent people.[93] The causes of the erroneous convictions varied, Borchard found, with mistaken identifications and witness perjury being the two most prominent causes.[94] A sizeable number of the erroneous convictions were the result of "overzealousness" by prosecutors, typically in neglecting to scrutinize more carefully the evidentiary weakness in the case.[95]

Moreover, it is likely that the Hughes Court was aware of the public outcry over the prosecution and conviction of anarchists Nicola Sacco and Bartolomeo Vanzetti for the murders of a paymaster and his guard in South Braintree, Massachusetts and the defendants' execution in 1927. Sacco and Vanzetti were prosecuted during the panic of the "Big Red Scare," described as "an era of lawless and disorderly defense of law and order, of unconstitutional defense of the Constitution," and a

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90. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612 (1999) (citing several cases and commentary, Professor Green notes that the concept of a prosecutor's duty to "seek justice" or "do justice" dates back well over a century).

91. CHAFEE, *supra* note 62, at 268.

92. Learned Hand famously wrote that "[o]ur procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream." United States v. Garsson, 291 F. Supp. 646, 649 (S.D.N.Y. 1923).

93. EDWIN M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE vii (1932).

94. *See id.* at vi (stating that the causes of error included mistaken identification, erroneous inferences drawn from circumstantial evidence, perjury by witnesses, or some combination of the three).

95. *See id.* at 380 (listing erroneous cases resulting from overzealous prosecutions).

"reign of terror."[96] The Sacco-Vanzetti case became a *cause célèbre* in the United States and abroad, and there was considerable public sentiment that the defendants were innocent and did not receive a fair trial.[97] The concern in the Wickersham Report that a fair trial may be denied to persons belonging to unpopular groups was a clear reference to the Sacco-Vanzetti case. Although there has never been conclusive proof of Sacco and Vanzetti's innocence, there is ample evidence that the prosecutor's misconduct and the trial judge's bias destroyed the defendants' ability to receive a fair trial.[98]

It is also likely that the Hughes Court's focus on the prosecutor's duty to protect the innocent may have included a recognition that among the "improper methods" used by prosecutors to convict innocent defendants was the failure to reveal evidence that might exonerate the accused. Although at the time of *Berger* a prosecutor's duty to provide favorable evidence to a defendant was nonexistent,[99] the *Berger* Court was aware that a prosecutor could obstruct the fact-finding process by suppressing exculpatory evidence and presenting false testimony. Indeed, the Court in *Mooney v. Holohan*, decided the same term as *Berger*, assumed that a state murder conviction would violate due process if the prosecutor allowed a key witness to give perjured testimony without disclosing this fact. To be sure, none of the innocence cases cited by Professor Borchard identify the nondisclosure by the prosecutor of exculpatory evidence as a contributing factor; nor does the Wickersham Report identify a prosecutor's failure to reveal favorable evidence to the defense as one of the principal types of unfairness. However, presumably neither Professor Borchard nor the

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96. FREDRICK LEWIS ALLEN, ONLY YESTERDAY 40 (Perennial Classics 2000) (1931).

97. *Id.* at 74.

98. *See* HERBERT B. EHRMANN, THE CASE THAT WILL NOT DIE: *COMMONWEALTH VS. SACCO AND VANZETTI* xiii (1969) (stating that a failure to try the defendants on honestly presented evidence could not be undone); *see also* FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927) (providing a brief overview of the voluminous case material in the Sacco-Vanzetti case).

99. *See* Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 242 (1964) ("A defendant has hardly had a fair trial if he has been denied the opportunity to discover evidence or information crucial to his defense."). The principal means of disclosure at the time of *Berger* was through informal exchanges of information or incidental discovery through preliminary proceedings. Although pre-trial discovery in civil cases dramatically expanded in the 1920s and 1940s, discovery in criminal cases was resisted on the ground that it would facilitate perjury and harm potential witnesses. Some criminal courts at the time of *Berger* appeared to have an inherent power "to compel the discovery of documents in furtherance of justice." And Canon 5 of the Canons of Professional Ethics imposed on prosecutors an ethical duty to disclose evidence that would exonerate the accused: "The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." *Infra* note 101.

authors of the Wickersham Report would have found it surprising that some prosecutors at the time of *Berger* would have possessed evidence in their files that exonerated the defendant but did not disclose that evidence to the defense. In fact, it may be only because of the notoriety of the case and the meticulous examination of the trial record by supporters of Sacco and Vanzetti during the post-conviction litigation that evidence was discovered that the prosecutor suppressed the following: (1) an expert's report that would have contradicted the prosecution's theory that the murder bullets came from Sacco's pistol; and (2) evidence of the existence of several eyewitnesses whose testimony would have excluded Vanzetti.[100]

Also, there is little doubt that Justice Sutherland's articulation of the special obligation of the prosecutor to ensure that "justice shall be done" was influenced by then-Canon 5 of the Canons of Professional Ethics of the American Bar Association, which stated: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."[101] The *Berger* Court must have understood Canon 5's ethical proscription of a prosecutor's duty "to see that justice is done" as requiring a prosecutor to temper his zeal to win a conviction to minimize the risk that an innocent defendant will be convicted. And to minimize that risk, a prosecutor under the prevailing ethical standard was cautioned to disclose information to the defense that was capable of establishing the defendant's innocence.

Finally, at the time of *Berger*, the process of appellate review of errors that may have contributed to a criminal conviction was erratic and unprincipled. The *Berger* Court may have seen the need to examine what one critic called the "wayward course of harmless error" whereby some appellate courts routinely held that trial errors, no matter how trivial, raised a presumption of prejudice or called for automatic reversal.[102] *Berger* implied that reviewing courts properly should ignore errors that were "inconsequential" or had only a "possible," as opposed to "probable," impact on the result. The Court sided with the

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100. *See* FRANKFURTER, *supra* note 98, at 73–91 (describing "mass of new evidence" discovered after the trial that was suppressed by the prosecution and could have exonerated the defendants).

101. GEORGE P. COSTIGAN, JR., CASES AND OTHER AUTHORITIES ON THE LEGAL PROFESSION AND ITS ETHICS 572–73 (2d ed. 1933).

102. *See* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 13–17 (1970) (explaining that courts feared invading the province of the jury and reversed decisions for the smallest of errors until the enactment of the "harmless error" statutes).

reformers of harmless error that reversals should not be based on "the mere etiquette of trials" or the "minutiae of procedure."[103] *Berger* applied the recently enacted federal harmless error statute to find that the variance between the indictment and the proof was a harmless error because it neither prejudiced the defendant nor surprised him.[104] By contrast, the Court found that the prosecutor's misconduct was not harmless; the misconduct, in the language of the harmless error statute, did "affect the substantial rights of the [defendant]." According to the Court, the prosecutor's misconduct was "pronounced and persistent," the evidence against the defendant was "weak," and the trial judge did not take "stern and repressive measures" to correct the situation. "In these circumstances," the Court said, "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence."[105]

Although the *Berger* Court for the first time applied the harmless error statute to a prosecutor's misconduct, its analysis was conclusory; the Court did not establish meaningful standards to guide an appellate court's discretion and judgment in the evaluation of misconduct. That the prosecutor's misconduct in *Berger* caused injury to the defendant's substantial rights was an easy call. However, it is far from clear that the Court would have vacated the conviction if the proof of guilt had been factually stronger and the trial judge had taken forceful actions to stop the prosecutor. Presumably, under the *Berger* approach, if a prosecutor committed extreme misconduct but the evidence of guilt was strong and the trial judge issued curative instructions, the conviction likely would have been upheld. But if the conviction was upheld, what does this say about *Berger*'s inspiring language? Was it intended to have any substantive effect? Or was it merely employed in this run-of-the-mill error-correction case as a rhetorical device to be incanted ritualistically by courts and commentators as a reminder to prosecutors not to behave badly?

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103. *See* Bruno v. United States, 308 U.S. 287, 294 (1939) (explaining that the Act was intended to prevent trivial matters from touching the merits of a verdict); *see also* TRAYNOR, *supra* note 102, at 14 (observing that "harmless error" statutes were enacted by the federal government and many states to preserve judgments when an error did not deprive a party of rules or procedures essential to a fair trial).

104. Berger v. United States, 295 U.S. 78, 82–83 (1935). The then-existing statute, 28 U.S.C. § 391, has been slightly modified and is codified in the federal rules. *See* FED. R. CRIM. P. 52 ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

105. *Berger*, 295 U.S. at 89.

III. *BERGER* SINCE

The first Part of this Essay speculated on the reasons why the Supreme Court may have chosen to review *Berger*.[106] This Part considers *Berger*'s subsequent impact on law and ethics, and the special place it occupies in today's legal and ethical culture. *Berger* is *sui generis*. *Berger* is the most authoritative and eloquent description in U.S. law of the role of the prosecutor in administering criminal justice. It is not an overstatement to say that *Berger* has become a virtual anthem to the prosecutor's duty not to win a case, but to ensure that justice is done, to protect the innocent, and to refrain from striking foul blows. When courts review serious misconduct by prosecutors, they cite *Berger*; when defense lawyers accuse prosecutors of misconduct, they cite *Berger*; when academics write about prosecutorial ethics, they cite *Berger*; when bar associations promulgate ethical rules for prosecutors, they cite *Berger*. And even when prosecutors describe their professional obligations, they cite *Berger* as authority to strike hard blows to convict the guilty.

Given *Berger*'s current prominence, it is ironic that it attracted so little attention in the years immediately following the decision. *Berger*'s description of the flagrant misconduct of the prosecutor and its inspiring rhetoric about the proper use of prosecutorial power, however hortatory, had no role in deterring and punishing misconduct by prosecutors. It established no rule of law; it merely reiterated the contemporary understanding of the prosecutor's role to seek justice. *Berger* established no standards to guide prosecutors except for its broad command to prosecutors not to strike the types of foul blows committed by Singer. In view of its facts, and its ambiguous recognition that prosecutors are allowed to strike hard blows to win convictions, *Berger* could not serve as a meaningful precedent in those instances where prosecutors engage in less overtly prejudicial conduct.

For these reasons, as well as the fact that it was a tumultuous period for the Court and the nation, *Berger* received scant attention in the mainstream press and legal journals,[107] and has been relegated to

106. As noted above, the Court may have been influenced by the widespread existence and notoriety of prosecutorial misconduct, which undermined public confidence in the integrity of the criminal justice system; its own commitment to protecting personal rights and freedoms, which included protecting the rights of persons accused of crime from government overreaching; its recognition of the vulnerability of the criminal justice system to serious errors that might result in the conviction of an innocent person; and its interest in articulating a more principled basis for appellate reversal of trial errors.

107. *See* Recent Decisions, *Criminal Law—Misconduct of Attorneys During Trial—Possible Remedies*, 34 MICH. L. REV. 1044, 1044–47 (1936) (discussing *Berger*'s implications on future

footnote status by historians of the Court. *Berger* was not cited in several accounts of the Court under Chief Justice Hughes,[108] and received only one brief reference in several biographies about and testimonials to its author, Justice George Sutherland.[109] A search of Justice Sutherland's papers in the Library of Congress found no mention of the case. Moreover, *Berger*'s immediate impact on the development of federal substantive and procedural law appears to have been marginal. To be sure, courts in the years immediately following *Berger* did cite the case occasionally, mostly for its treatment of the variance issue, and viewed that portion of the case dealing with the prosecutor's misconduct as an afterthought.[110] There is no indication that *Berger* influenced the way prosecutors charged and proved conspiracies, presented evidence at trial, or made arguments to the jury. Nor is there any indication that *Berger* inspired bar associations or disciplinary agencies to examine the conduct of prosecutors more closely or promulgate new rules governing the conduct of prosecutors. Academic discussion over the prosecutor's role as a "minister of justice" was negligible. And *Berger* failed to clarify the standards for appellate review of error and misconduct, and indeed may have added to the confusion.[111]

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cases and professional ethics); Recent Criminal Cases, *Improper Conduct of Prosecuting Attorney as Ground for Reversal*, 26 AM. INST. CRIM. L. & CRIMINOLOGY 276, 276–78 (1935–1936) (commenting that *Berger* represents a step toward curbing the unethical practices of attorneys); *High Court Scores Federal Attorney*, N.Y. TIMES, Apr. 16, 1935, at 15 (recapping briefly the result in *Berger*).

108. *See* SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951) (analyzing the contribution Hughes made to constitutional issues); ROSS, *supra* note 5 (exploring the "judicial revolution" in the context of the Hughes Court).

109. *See* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS xii (1994) (not citing *Berger* but noting Sutherland's "highest function as a judge was to articulate the principles of justice, and the requirements of the American Constitution"); MEMORIALS OF THE JUSTICES OF THE SUPREME COURT 463 (1981) (not citing *Berger* but noting Sutherland's concern over "encroachments of government on the freedom of the individual [and] the perils of the oppressive exercise of governmental power"); JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 212 (1951) (reproducing Sutherland's famous passage in *Berger* as reflective of Sutherland's "great concern for the preservation of personal liberty," his "emphasis on the unequal nature of the struggle waged by government and the individual," and his concern that "[w]ith all the resources of society at its command, government was under an overwhelming obligation to proceed with the utmost fairness and justice whoever the accused might be").

110. *See* Blumenthal v. United States, 332 U.S. 539, 548 (1947) (applying variance and harmless error to the conspiracy charge at issue); Kotteakos v. United States, 328 U.S. 750, 756–57 (1946) (explaining that the true inquiry is whether a variance has affected the substantial rights of the accused); United States v. Ballard, 322 U.S. 78, 91 (1944) (explaining that a conviction can be reversed only upon a showing of injury to the "substantial rights" of the accused).

111. *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 655–64 (2d Cir. 1946) (Frank, J., dissenting) (suggesting that the so-called "*Berger* doctrine" for harmless error was

Tracking the course of criminal law and procedure since *Berger* makes it even more ironic that *Berger* has attained jurisprudential immortality. *Berger*'s idealized depiction of the prosecutor as a "minister of justice" who is duty-bound to protect the innocent and to prevent miscarriages of justice scarcely coincides with the harsh reality of post-*Berger* criminal prosecution. Observers who have studied prosecutors' conduct since *Berger* have concluded that prosecutors continue to engage in the same types of blatant misconduct as that committed by Singer, and indeed, have found many new ways to hit below the belt.[112] Empirical studies increasingly have documented serious and pervasive misconduct by prosecutors.[113] Courts since *Berger* have continued to lament their inability to make prosecutors play by the rules.[114] And with a few exceptions, there is little evidence

being misapplied by appellate courts in affirming convictions despite serious misconduct by prosecutors).

112. *See* ANGELA DAVIS, ARBITRARY JUSTICE 123–41 (2007) (discussing prosecutorial misconduct and the abuse and discretion of power); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 476–79 (2d ed. 2009–2010) [hereinafter GERSHMAN, PROSECUTORIAL MISCONDUCT] (discussing prosecutorial misconduct as related to prosecutors' arguments to the jury, which is "one of the most common contentions" with the conduct of prosecutors, and is the primary type of misconduct committed by the prosecutor in *Berger*); JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT 24 (2d ed. 1999) (outlining the role of the prosecutor as trial counsel, and suggesting that trial guidelines governing the prosecutorial function are "most frequently violated by the prosecution").

113. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON REPORTING MISCONDUCT 3 (2007) (reporting a study of 2,130 cases over a ten-year period raising claims of prosecutorial misconduct and finding misconduct in 443 cases, or 21%); JAMES LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 5 (2000) (noting that error rate in capital cases was 68% and that prosecutorial misconduct accounted for 16% to 19% of reversible errors); Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at 3 (reporting a national study of 11,000 homicide convictions between 1963 and 1999 in which 381 convictions were reversed for prosecutorial misconduct); Bill Moushey, *Win at All Costs*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998, http://www.post-gazette.com/win/day3_1a.asp (reporting a study of over 1,500 cases nationwide during the past decade that found hundreds of cases in which prosecutors intentionally concealed exculpatory evidence); Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, CTR. FOR PUB. INTEGRITY 2 (2003) (analyzing 11,452 post-1970 convictions that appellate courts reviewed for prosecutorial misconduct, and in which courts reversed 2,012 convictions for prosecutorial misconduct).

114. *See, e.g.*, United States v. Hinson, 585 F.3d 1328, 1337–38 (10th Cir. 2009) (noting court's previous criticism of widespread abuse of hearsay rule by Kansas U.S. Attorney's Office and reminding prosecutors of *Berger*'s injunction to prosecutors "not that it shall win a case but that justice shall be done"); United States v. Mooney, 315 F.3d 54, 61 n.1 (1st Cir. 2002) ("It is difficult to imagine a more fundamental error. We hope that we will not see this error again by prosecutors in our circuit."); United States v. Martinez-Medina, 279 F.3d 105, 127–28 (1st Cir. 2002) (expressing "impatience" with the office of the U.S. Attorney for the District of Puerto Rico because "[d]espite numerous warnings from panels of this Court, its prosecutors continue to flout clear rules of ethical conduct in their zeal to secure convictions"); United States v. Pallais,

that courts, lawmakers, or professional disciplinary agencies have demonstrated a willingness or capacity to impose sanctions on prosecutors for committing foul blows.[115]

Ironically, although criminal defendants' rights expanded after *Berger*, the courts have shown an extraordinary deference to the prosecutor's power and discretion.[116] Moreover, concern over the prosecutor's contribution to the conviction of the innocent, which may have seemed at the time of *Berger* to be more hypothetical than real, is a far more pressing concern today given the increasing evidence that innocent people are erroneously convicted.[117] Indeed, courts and commentators increasingly recognize that prosecutors' improper methods do contribute to wrongful convictions.[118] Finally, despite *Berger*'s condemnation of the prosecutor's misconduct as prejudicial error, courts and commentators realize that the harmless error rule may even encourage prosecutors to commit foul blows in the rational expectation that they will not be penalized.[119]

In the years immediately after, courts most often cited *Berger* for its holding that a variance between the charge and the proof could be harmless error, and for its conclusion that a prosecutor's misconduct could be prejudicial error.[120] The courts cited Sutherland's now-famous

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921 F.2d 684, 691–92 (7th Cir. 1990) (expressing frustration at futility of repeated rebukes of prosecutors); United States v. Modica, 663 F.2d 1173, 1174 (2d Cir. 1981) (expressing "frustration" at "unheeded condemnations" of prosecutors).

115. *See* John F. Terzano, Joyce A. McGee & Alanna D. Holt, *Improving Prosecutorial Accountability—A Policy Review*, THE JUSTICE PROJECT 5 (2009), http://www.thejusticeproject.org/wp-content/uploads/pr-improving-prosecutorial-accountability.pdf (describing prevalence of prosecutorial misconduct and the absence of significant restraints on misconduct, and recommending ways to improve accountability).

116. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 424–43 (1992) (discussing increased insularity of prosecutors from judicial control).

117. As of September 10, 2010, there have been 258 DNA exonerations in the United States. *See Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/351.php (last visited Sept. 10, 2010). For non-DNA exonerations, see, e.g., Robbie Brown, *Judges Free Inmate on Recommendation of Special Innocence Panel*, N.Y. TIMES, Feb. 17, 2010, at A14 (noting that Gregory F. Taylor's exoneration by the North Carolina Innocence Commission was the only one of its kind in the nation).

118. *See infra* note 144 and accompanying text (describing numerous instances of prosecutorial misconduct that has directly led to the conviction of innocent persons).

119. *See, e.g.*, Rose v. Clark, 478 U.S. 570, 579 (1986) ("Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed."); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 440 (1980) (arguing that harmless error tempts prosecutors to use evidence or techniques they would otherwise avoid because of potential appellate reversal).

120. *See supra* note 110 (discussing the issues of variance and prosecutorial misconduct, and suggesting that the material issue is whether a variance has compromised the substantial rights of

passage occasionally but infrequently. However, time has overtaken *Berger* as a precedent for applying the harmless error rule to variances between charge and proof. That holding was followed, distinguished, and then overruled by the Court in *Stirone v. United States*, which held that a variance between allegation and proof could not be harmless error.[121] A defendant, according to *Stirone*, has a fundamental right to be tried only on charges presented in the indictment. Rejecting *Berger*'s approach, the Court concluded that "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."[122]

Moreover, *Berger*'s framework to determine whether a verdict was harmed by the prosecutor's misconduct produced ambiguous and often unsatisfying results, particularly when the prosecutor's misconduct was severe but the evidence of guilt was also strong. The Court applied its harmless error approach to a prosecutor's misconduct in two cases decided a few years after *Berger*. In *Viereck v. United States*, citing *Berger*, the Court reversed the conviction, finding that the prosecutor's patriotic tirade against the defendant in the summation caused substantial prejudice.[123] The prosecutor's remarks, said the Court, were "highly prejudicial and . . . offensive to the dignity and good order with which all proceedings in court should be conducted."[124] In *United States v. Socony-Vacuum Oil Co.*, by contrast, the Court affirmed the conviction, finding that the prosecutor's "undignified and intemperate" appeal to class prejudice involved isolated and incidental statements during a long trial.[125] Distinguishing *Berger*, the Court noted that the case was not weak, the prosecutor's misconduct did not permeate the trial, the defense did not object, and the trial judge gave the jury a curative instruction.[126] Although *Viereck* and *Socony Oil* are consistent with *Berger*, they did not clarify the harmless error rule's application to prosecutorial misconduct generally. Indeed, courts after *Berger* routinely upheld convictions notwithstanding serious misconduct by prosecutors. Critics claimed this result had the unfortunate systemic consequence of conveying to prosecutors the tacit message that if the proof of guilt was strong, the prosecutor could strike foul blows with

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the accused).

121. 361 U.S. 212, 215–16 (1960) ("[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.").

122. *Id.* at 217.

123. 318 U.S. 236, 248 (1943).

124. *Id.*

125. 310 U.S. 150, 239–40 (1940).

126. *Id.* at 239–42.

impunity. Also, by issuing a ritualistic "verbal spanking" to the prosecutor but not imposing any penalty, the appellate court "breeds a deplorably cynical attitude towards the judiciary."[127]

Berger's exhortation to prosecutors to seek justice was an abstract concept until *Jencks v. United States*,[128] decided in 1957. In the case that embodies the familiar "Jencks Rule" in criminal procedure,[129] the Court gave meaning to *Berger*'s command that the government's interest "is not that it shall win a case, but that justice shall be done" for the first time. The Court used its supervisory power to hold that federal prosecutors must disclose to the defendant any written reports of government witnesses for inspection and possible use to discredit these witnesses. "Justice requires no less," the Court said, citing *Berger* and Canon 5 of the ABA Canons of Professional Ethics—at the time the exclusive ethical rule governing the conduct of prosecutors.[130] The Court emphatically rejected the government's self-serving plea that protection of the government's confidential files should override public disclosure. The government's duty is "to see that justice is done," the Court responded, and it would be "unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."[131]

Jencks is a tipping point in the evolution of *Berger* from a relatively obscure decision to a case that thereafter increasingly dominates legal and ethical discourse over the prosecutor's role. In the decades since *Jencks*, Sutherland's passage has been cited with increasing frequency.[132] For example, *Berger* was cited in law reviews roughly 100 times from 1960 through 1980, nearly 300 times in the 1990s, and close to 500 times in the last decade, often by commentators who have written about the meaning of *Berger*'s exhortation to prosecutors to "do justice."[133] Similarly, citation to *Berger* in appellate briefs has

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127. United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

128. 353 U.S. 657 (1957).

129. *Jencks* has been codified in 18 U.S.C. § 3500, commonly referred to as the "Jencks Act."

130. *Jencks*, 353 U.S. at 668, 669 n.13.

131. *Id.* at 671.

132. Although "citation-tracking" admittedly may be an inexact measurement, it does provide some basis to assess the influence of a case, especially as it reinforces impressions gained from hands-on research and review of the legal literature.

133. Among the many contemporary articles focusing on *Berger*'s exhortation to prosecutors to "do justice," see Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO J. LEGAL ETHICS 1301 (1996); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek*

increased, from nearly 2,000 times in the 1990s to well over 3,000 times in the past decade. *Berger*'s injunction to seek justice and refrain from striking foul blows has been cited in codes of professional ethics,[134] professional ethics treatises,[135] and bar association proposals for criminal justice reform.[136]

Decisions that refer to *Berger*'s "do justice" command often involve prosecutorial misconduct that resembles the prosecutor's conduct in *Jencks*—failure to reveal evidence to the defense that might assist in the search for the truth.[137] Since *Jencks*, *Berger* has been routinely cited as the authority for the prosecutor's legal and ethical duty to disclose. Indeed, review of cases in which courts have cited *Berger*'s command suggests that one of the central meanings of *Berger* is the prosecutor's obligation to promote fact-finding accuracy and refrain from conduct that skews the adjudicatory process. Indeed, *Jencks* presaged the Court's landmark ruling eight years later in *Brady v. Maryland*, in which the Court for the first time imposed on prosecutors a constitutional—rather than a statutory—duty to disclose exculpatory evidence to defendants.[138] Mirroring the language in *Berger*, the Court

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Justice," 82 NOTRE DAME L. REV. 635 (2006); Brandon K. Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475 (2007); Green, *supra* note 90; Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337 (2004); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH L. REV. 35 (2009); Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67 (2008); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

134. *See* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEFENSE FUNCTION § 3-5.8 (3d ed. 1993) (pertaining to a prosecutor's argument to the jury).

135. *See* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 94 (2005) (describing instances of prosecutorial overreaching and a prosecutor's duty "to ensure a level playing field"); JOHN JAY DOUGLASS, ETHICAL ISSUES IN PROSECUTION 16–21 (1988) (explaining how the standard of conduct for prosecutors has been compacted into *Berger*'s famous quotes); PETER A. JOY & KEVIN MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 5–7 (2009) (describing *Berger* and the way it has been incorporated in Model Rules not just for prosecutors, but for all lawyers).

136. *See* AD HOC COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ABA CRIMINAL JUSTICE SECTION, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY xxvii (Paul Giannelli & Myrna Raeder eds., 2006) (incorporating the text of *Berger* into the practice of prosecution).

137. In *Jencks*, the evidence included prior statements of witnesses that could be used to discredit their testimony. By refusing to disclose the statements, the prosecutor took advantage of the defendant's ignorance of the content of the statements and engaged in adversarial unfairness by requiring a litigant to establish the relevance of evidence about which only the adverse party is aware.

138. 373 U.S. 83, 87 (1963).

in *Brady* wrote that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[139]

Brady did not cite *Berger*. Nevertheless, it is impossible to read *Brady* without believing that *Berger* heavily influenced that decision.[140] The Court may have chosen not to cite *Berger* because the prosecutor in *Brady* either did not strike a foul blow or deliberately seek to subvert the fact-finding process. Indeed, there was ample evidence that Brady was guilty of capital murder, and he conceded as much. He argued that he should not have been sentenced to death because his accomplice did the actual shooting, and there was an isolated statement in the prosecutor's files—that the prosecutor inadvertently failed to turn over to Brady's lawyer despite his request—in which the accomplice admitted the killing. In establishing the now well-known *Brady* Rule, the Court made clear that intentional prosecutorial misconduct is not required to establish a *Brady* violation.[141]

Despite this, *Berger* is cited in virtually every important post-*Brady* decision of the Court involving a prosecutor's nondisclosure of exculpatory evidence.[142] Further, *Berger* and *Brady* are cited in tandem for the principle that a prosecutor who suppresses exculpatory evidence violates not only his constitutional due process duty but also his ethical duty to ensure "that justice shall be done."[143] And to the extent that

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139. *Id.*

140. The Court in *Brady* described the prosecutor as the "architect" of the proceeding with the power to "shape a trial that bears heavily on the defendant." *Id.* at 88.

141. *Id.* at 87 (finding that suppression of material evidence violates due process "irrespective of the good faith or bad faith of the prosecution"). This point was reinforced in *United States v. Agurs*, 427 U.S. 97, 110–11 (1976), the Court's most important post-*Brady* decision in which it, citing *Berger*, emphasized that the prosecutor's constitutional duty under *Brady* is not measured by the "moral culpability, or the willfulness, of the prosecutor."

142. *See, e.g.*, Cone v. Bell, 129 S. Ct. 1769, 1772, 1782 (2009) (stating that it is the prosecutor's duty to ensure "that justice shall be done" and "to refrain from improper methods calculated to produce a wrongful conviction"); Banks v. Dretke, 540 U.S. 668, 694, 696 (2004) (noting that it is "appropriate for [defendant] to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction"; and emphasizing the "special role played by the American prosecutor in the search for truth in criminal trials" and the prosecutor's duty "to refrain from improper methods to secure a conviction"); Strickler v. Greene, 527 U.S. 263, 281 (1999) (stating that a prosecutor's interest "is not that it shall win a case, but that justice shall be done"); Kyles v. Whitley, 514 U.S. 419, 439 (1995) (emphasizing that a prosecutor's interest "is not that it shall win a case, but that justice shall be done"); United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) (stating that a prosecutor's interest "is not that it shall win a case, but that justice shall be done"); *Agurs*, 427 U.S. at 111 (noting that a prosecutor is a "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer").

143. *See Cone*, 129 S. Ct. at 1772 (stating that by suppressing material evidence relating "to

courts and commentators increasingly have recognized a relationship between a prosecutor's failure to disclose exculpatory evidence and the wrongful conviction of the innocent, *Brady* and *Berger* represent the legal and ethical lodestars that a prosecutor is obliged to follow.[144] The cases that link the *Brady* duty with *Berger* emphasize the special role the prosecutor plays in the search for truth.[145]

Since *Brady*, the visibility of prosecutors in law and culture has increased, misconduct by prosecutors has become more transparent, and *Berger*'s rise to fame has paralleled that trajectory. Citing *Berger*, one of the Court's opinions observed that "[l]ike the Hydra slain by Hercules, prosecutorial misconduct has many heads."[146] That opinion proceeded to enumerate the many types of post-*Berger* "foul blows" that prosecutors commit, some old and some new. It would be impossible to list compactly and comprehensively these new types of foul blows. Suffice it to say that foul blows today not only embrace the misconduct in *Berger* and the conduct condemned in the Wickersham Report—presenting inadmissible evidence, assassinating the character of the defendant, abusing witnesses, becoming an unsworn witness, and making inflammatory and other improper remarks to the jury—but also misconduct that *Berger* neither addressed nor even contemplated, including various types of grand jury abuses, breaches of guilty-plea agreements, instituting criminal charges in bad faith, unconstitutional selections of petit and grand juries, violations of rules of discovery and disclosure, interfering with the attorney-client representation, and refusing to investigate claims of innocence.

Moreover, as the courts continue to recognize new rights of criminal defendants, prosecutors continue to devise new and improper ways to

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guilt or to punishment" of the accused, a prosecutor violates the defendant's rights to due process under the Fourteenth Amendment); Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) (describing the high standard of conduct to which the prosecution is held in criminal trials).

144. *See* United States v. Jones, 620 F. Supp. 2d 163, 170 (D. Mass. 2009) ("[I]n response to a disturbing number of wrongful convictions resulting in death sentences, in 2002 the Illinois Commission on Capital Punishment recommended that the Illinois Supreme Court 'adopt a rule defining 'exculpatory evidence' in order to provide guidance to counsel in making appropriate disclosures.'"); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 688 n.18 (2006) (listing several cases in which a prosecutor's suppression of exculpatory evidence contributed to the conviction of innocent persons); Weinberg, *supra* note 113 (noting that in twenty-eight cases involving thirty-two defendants, misconduct by prosecutors, including suppression of exculpatory evidence, led to the conviction of innocent persons).

145. *See Banks*, 540 U.S. at 696 ("We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'").

146. *See* United States v. Williams, 504 U.S. 36, 60 (1992) (Stevens, J., dissenting) (discussing some of the many methods of prosecutorial misconduct).

impair the exercise of those rights.[147] Some of this misconduct is blatant and easily characterized as "foul." Other misconduct might have been characterized by *Berger* as taking "cheap shots" at the defendant indirectly and less blatantly. For example, although prosecutors are enjoined from making direct comments on a defendant's exercise of his right to remain silent, prosecutors have devised numerous ways to refer to a defendant's silence less overtly. Prosecutors have also found ways to burden a defendant's exercise of other constitutional rights that either escape judicial censure entirely or might be found to be harmless error. Prosecutors have found new ways to subvert the rules of evidence and to introduce inadmissible evidence indirectly under the guise of some feigned legitimate purpose. Prosecutors also have created charades to mask deals with cooperating witnesses in order to prevent exposure of the agreement through cross-examination. Prosecutors have devised other schemes and tactics to prevent the accused from gaining access to exculpatory evidence. Prosecutors have also used their control of experts to introduce outlandish opinions, distort the facts, and mislead the jury. Courts might disagree on the extent of the prejudice, as the Second Circuit and Supreme Court disagreed in *Berger*, but likely would find the above conduct not only to be antithetical to the prosecutor's duty "that justice shall be done" but also to involve "improper methods calculated to produce a wrongful conviction."[148]

IV. AFTERTHOUGHTS

Reflecting on *Berger v. United States* seventy-five years later, one is struck by the dissonance between *Berger*'s clarion call to prosecutors to play fairly and by the rules, and the reality of prosecutorial practice today. Perhaps the *Berger* Court was simply naïve and, like society generally, the criminal justice system has become less idealistic with age. Hundreds of cases each year describe conduct by prosecutors that any reasonable observer would characterize as "foul" and inconsistent with the promotion of justice. Some critics have accused prosecutors of "running amok."[149] Courts reverse some of these cases; editorial

147. *See, e.g.*, GERSHMAN, PROSECUTORIAL MISCONDUCT, *supra* note 112, at 497–506 (discussing various rights afforded to criminal defendants and the ways in which prosecutors have violated these rights).

148. Berger v. United States, 295 U.S. 78, 88 (1935).

149. *See* Scott Horton, Remarks for a Luncheon of the New York Rotary Club and the American Constitution Society (May 3, 2010) (transcript available at http://www.harpers.org/media/image/blogs/misc/remarks_for_a_luncheon_of_the_rotary_club_and_american_constitutionsociety.pdf) (suggesting remedial steps to stop prosecutorial abuse). Several federal district judges have excoriated federal prosecutors recently for serious misconduct. *See* United States v.

writers occasionally chastise some of these prosecutors; and academics continue to bemoan the sorry state of criminal justice, the inability of prosecutors to behave properly, and the failure of courts, lawmakers, and disciplinary bodies to make prosecutors accountable. *Berger* seems like a brooding omnipresence when prosecutors are accused of misconduct; it is routinely cited but largely ignored.

Berger's transformation from a relatively obscure decision seventy-five years ago to a case of lasting meaning is curious. To be sure, *Berger*'s meaning has not changed; it is the legal system that has changed, and most notably the prosecutor. The changed role of the prosecutor appears to have brought a new awareness of *Berger*'s relevance. Given the prosecutor's increasing domination of criminal law, his unilateral control of proof, his virtually unfettered power to charge, bargain, and give immunity, and the deference given to his hard blows to convict guilty people, it is hardly surprising that *Berger*'s rhetoric would be summoned, however wistfully, to express an ideal of justice, but would be too weak to be a meaningful limit. As with so much of the Court's other misplaced rhetoric—"wall of separation," "captive audience," and "marketplace of ideas"—*Berger*'s lofty rhetoric about the role of the prosecutor is incapable of influencing the continuing ability of prosecutors to strike foul blows and escape accountability. Seventy-five years later, *Berger* is honored more for its grand message than in its observance.

Shaygan, 661 F. Supp. 2d 1289, 1292 (S.D. Fla. 2009) (characterizing prosecutorial misconduct as "disturbing" and "troubling" and imposing sanctions); United States v. Jones, 609 F. Supp. 2d 113, 119 (D. Mass. 2009) ("The egregious failure of the government to disclose plainly material exculpatory evidence extends a dismal history of intentional and inadvertent violations of the government's duties."); United States v. W.R. Grace, No. 05-07-M-DWM (D. Mont. Apr. 28, 2009) (finding that prosecutors committed "clear and admitted violations" of federal law that manifests "a systemic problem" in the Department of Justice); Transcript of Record at 5195, 5198, 5202, United States v. Ruehle, 2009 U.S. Dist. LEXIS 117895 (C.D. Cal. Dec. 15, 2009) (No. SACR 08-139-CJC) (finding that prosecutors "intimidated and improperly influenced" witnesses and engaged in other "wrongful acts," and quoting the famous passage from *Berger* noting its "sincere[] regret that the government did not heed the righteous words of the Supreme Court"); Transcript of Record at 3, United States v. Stevens, 2009 WL 6525926 (D.D.C. Apr. 7, 2009) (No. 08-231) ("In nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case."). The Deputy Attorney General in the Department of Justice, on January 4, 2010, in response to these and other cases in which courts found Department of Justice prosecutors to have committed serious violations, issued a detailed memorandum to provide guidance to prosecutors with respect to their discovery and disclosure obligations. The memo quoted Sutherland's famous passage in *Berger*. *See* Memorandum from David W. Ogden, Deputy Att'y Gen., to Dep't of Justice Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dag/dag-memo.html (regarding "Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group").